Filed 10/19/04 P. v. Bayless CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. DAVID LEE BAYLESS, Defendant and Appellant.	C043952 (Super. Ct. No. S02CRF0090)

A jury convicted defendant David Lee Bayless of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)--count I; further unspecified statutory references are to the Penal Code), assault with a firearm (§ 245, subd. (a)(2)--count II), and mayhem (§ 203)--count III). Regarding counts II and III, the jury also found that defendant inflicted great bodily injury (§ 12022.7) and used a firearm in the commission of the offenses (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (c), & (d)). After defendant waived a jury, the trial court found that

defendant had sustained a prior strike conviction (§ 667, subds. (b)-(i)).

Defendant was sentenced on count III to a term of 33 years to life--the middle term of four years, doubled to eight years for the strike, and enhanced by 25 years to life for the firearm use. A concurrent term of four years was imposed on count I; and a term of six years was imposed on count II, but stayed pursuant to section 654.

On appeal, defendant contends (1) the trial court abused its discretion by failing to dismiss his prior strike conviction, and (2) a 33-year to life term constitutes cruel and/or unusual punishment under the California and United States Constitutions. We reject both claims.

FACTS AND PROCEEDINGS

During the evening of August 15, 2002, defendant, his grandson, Joshua Stone, and defendant's neighbor, Donna Shevock, were drinking in defendant's apartment. At some point, Stone became angry after Shevock did not take Stone seriously when he bragged that there was a contract out on his life. Stone grabbed Shevock near her throat, lifted her out of her chair, and threw her through a screen door out of the apartment onto the concrete. Shevock returned to her apartment, showered and began to make her handgun ready in case Stone returned. At that point, Shevock heard a commotion outside and looked and saw police officers at defendant's apartment. She did not hear a gunshot that night.

Inside defendant's apartment officers found defendant, who was intoxicated, and Stone, who had been shot in the back and was crawling on the floor. Defendant said he had shot Stone because he thought Stone was going to beat up or kill some female. Defendant claimed that he did not intend to kill Stone, but was trying to shoot him in the legs. The shotgun blast to Stone's back caused him permanent paralysis from the waist down.

Defendant testified that he shot to disable Stone just after Stone had thrown Shevock outside the apartment and it looked to defendant as if Stone was still going after Shevock.

DISCUSSION

I

Section 1385 Request

Defendant requested that the trial court exercise its discretion pursuant to section 1385 and strike his 1977 conviction in Nevada for what was the California equivalent of a violation of section 288, subdivision (a). The court declined to do so, stating ". . . I'd be inclined to strike [the prior conviction] because it is so old. But here, unfortunately, you have a man who's been going through life committing crimes, some of them misdemeanors, some of them felonies. He commits a serious felony in Nevada, the 1977 case, and then he commits another similar type offense maybe 10 or 11 years later in Nevada. He's--he has at least two matters, felony type cases. [¶] He did have the possession of the firearm. In this case, before the incident happened, he was still in violation of the

law, because he was a convicted felon and had a shotgun regardless of the reasons."

Defendant argues the court abused its discretion in denying the motion because his prior strike was remote, his record of prior criminal offenses does not show a pattern of violent conduct, and the trial court failed to take into account his age (70 years old), the provocation of the instant offense, and that his crimes were primarily alcohol related. We are not persuaded.

In *People v. Carmony* (2004) 38 Cal.4th 367, the California Supreme Court held that an appellate court must apply the deferential abuse of discretion standard of review when considering a trial judge's decision not to dismiss or strike a sentencing allegation pursuant to section 1385. We "'must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*Id.* at p. 377.) A trial court does not abuse its discretion when it decides not to disregard a prior serious and/or violent felony "unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid.*)

Here, defendant's prior convictions are as follows: In 1954 he was convicted of petty theft and he received a sentence

of six-months in jail; in 1962, after an automobile accident where defendant had apparently been drinking, defendant was convicted of second degree manslaughter and again was sentenced to six-months in jail; in 1977, after molesting two girls aged five and nine over a lengthy period of time while he babysat with them, incidents again involving his use of alcohol, defendant was convicted of lewd acts on a child and was sentenced to state prison for five years; in 1988 defendant had consensual sex with a person under the age of 18 and was convicted of sexual seduction of a minor. As to this last offense, the People had no objection to probation, but the sentence imposed is not available from the record.

Thus, defendant has two prior felonies and two misdemeanor convictions. Although the strike prior was in 1977, defendant did not lead a blame-free life thereafter. Instead, as noted by the trial court, he again engaged in sexual acts with a minor about 10 years later. His instant offenses occurred in 2002 and involved his use of a gun, even though he knew he was prohibited from possessing a firearm, and his continued abuse of alcohol. As a result of defendant's conduct throughout his adult life, children have been molested, one person was killed, and defendant has permanently paralyzed another.

Nor is there any basis for asserting that the court failed to consider defendant's alcoholism and the provocation of the victim in this matter as mitigating factors. The court heard the trial and was clearly aware that his victim, Stone, was not without fault. However, the record showed that Shevock was in

no danger from Stone at the time defendant shot him in the back. The record also clearly showed that defendant had consumed considerable alcohol at the time and that he had a significant, nearly life long problem with alcohol abuse. A defendant's continued use of alcohol and his failure to address the problem may constitute an aggravating, rather than a mitigating factor. (See *People v. Reyes* (1987) 195 Cal.App.3d 957, 960-961, and cases cited therein.)

On this record, defendant has been, and continues to be, a danger to society. We certainly cannot say that the trial court's decision was so irrational or arbitrary that no reasonable person could agree with it. Defendant's claim of error necessarily fails.

II

Cruel and/or Unusual Punishment

Defendant argues that his sentence of 33 years to life is so grossly disproportionate to his offense that it violates state and federal constitutional prohibitions against cruel and/or unusual punishment.

First, a constitutional challenge to a sentence as cruel and/or unusual is fact specific, hence it must be raised in the trial court to obtain review on appeal. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.)

Even though defendant's failure to raise the issue in the trial court forfeits the issue on appeal, if we had considered it we would have rejected it.

A punishment may violate the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) Generally, three factors are to be considered in such a determination, including the nature of the offense and the offender, the penalty imposed for more serious crimes, and the penalty imposed for the same offense in other jurisdictions. (*Id.* at pp. 425-428.) Whether a punishment does in fact violate the prohibition against cruel and/or unusual punishment may be determined based upon the nature of the offense and the offender. (*People v. Dillon* (1983) 34 Cal.3d 441, 479, 482-488.)

As to the offense, defendant argues that because he was 70 years old and intoxicated he was incapable of physically coping with Stone's attack on Shevock. He says, in addition, he had no way of knowing the seriousness of her injuries. But by the time defendant shot Stone, Shevock had already returned to her apartment, showered and obtained a gun, all without ever hearing the shotgun blast. This evidence suggests that Stone was not continuing his assault on Shevock at the time defendant shot Stone and that his shooting of Stone was, on that basis at least, unnecessary.

As to the nature of the offender, as noted in the previous section, defendant has been a thief and a child molester; he has killed one person by drinking and driving, has continued to violate the law by illegally possessing a firearm, and has

permanently paralyzed his latest victim using that firearm. Defendant clearly remains a danger to society and his removal therefrom, given his entire record of criminal offenses, cannot be said to shock any reasonable person's conscience.

Defendant argues that his offense was less culpable than either first or second degree murder, yet he received a more severe sentence than could be imposed for those offenses. The argument is not well taken because it fails to take into consideration that the 25-years-to-life enhancement for intentional use of a firearm causing great bodily injury would also be applicable to the offenses of first and second degree murder, thereby increasing the base terms for the murders by an additional term of 25 years to life. (*People v. Chiu* (2003) 113 Cal.App.4th 1260, 1263-1264; *People v. Perez* (2001) 86 Cal.App.4th 675, 680-681.)

Defendant also notes that his sentence is considerably more severe than that which would be imposed for voluntary manslaughter, an offense with a maximum term of 11 years. However, for a killing to be voluntary manslaughter requires either provocation, which would rouse a reasonable person to a heat of passion or an unreasonable belief in the need to defend one's self or another. (*People v. Blakely* (2000) 23 Cal.4th 82, 88-89.) Neither circumstance is present in this case to reduce defendant's culpability, thus the comparison is inapt.

Although defendant's argument regarding a comparison of his sentence with those in other jurisdictions is not entirely clear, defendant seems to argue that the three strikes law

imposes too harsh of a penalty by comparison with recidivist laws in other states. However, "That California's [recidivist] punishment scheme is among the most extreme [in the nation] does not compel the conclusion that it is unconstitutionally cruel or unusual. This state's constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.)

With respect to defendant's claim that his sentence violates the federal Constitution's ban on cruel and unusual punishment, the federal Constitution "' forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135.)

Sentences that have been upheld by the United States Supreme Court include a sentence of life without parole for possession of a large amount of drugs by a first-time felon (*Harmelin v. Michigan* (1991) 501 U.S. 957 [115 L.Ed.2d 836]), and a life sentence for a recidivist thief (*Rummel v. Estelle* (1980) 445 U.S. 263 [63 L.Ed.2d 382]). If these sentences are not cruel and unusual, a fortiori, neither is the sentence imposed for the present offense. (See *Lockyer v. Andrade* (2003) 538 U.S. 63 [155 L.Ed.2d 144]; *Ewing v. California* (2003) 538 U.S. 11 [155 L.Ed.2d 108].)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SCOTLAND, P.J.

SIMS, J.